SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 786

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PITT RIVER POWER COMPANY (A CORPORATION),
*Petitioner,*

*against*

THE UNITED STATES.

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## BRIEF IN SUPPORT OF PETITION.

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### Opinions Below.

The opinion of the Court of Claims is set forth in the Record (R. 66-69). It is not yet officially reported.

### Jurisdiction.

Jurisdiction to issue the writ is conferred by the Act of February 13, 1925 (Ch. 229, Sec. 3 (c), 43 Stat. 939; 28 U. S. C. A., Sec. 288).

### Question Presented.

The statement of the question presented, specification of error and statement of facts are set forth in the petition, *ante.*

The relevant part of the Statute involved is set out in the Appendix (*post*, pp. 17-18).

**Argument.**

This is not a condemnation proceeding. The Government has not instituted any such proceeding, although the River and Harbor Act of July 18, 1918, (Ch. 155, Sec. 5, 40 Stat. 904, 911) provides that, if condemnation proceedings are instituted, such "proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that just compensation may be promptly ascertained and paid".

This is an action against the Government under the Fifth Amendment for the recovery of just compensation for property taken by the Government for public use.

Judicial Code, Sec. 145 (1); 28 U. S. C. A. Sec. 250;
*Phelps* v. *United States*, 274 U. S. 341, 344;
*Jacobs* v. *United States*, 290 U. S., 13, 16;
*Shoshone Tribe* v. *United States*, 299 U. S., 476, 497.

The petition alleges (R. 7) that lands of the Petitioner located along the Pitt River, a tributary of the Sacramento River, which are below the level of elevation 1065 feet on the United States Geological survey of the Kennett Reservoir, Shasta County, California, 1934, have been taken by The United States without the consent of the Petitioner. The lands so taken are indicated on the plan Exhibit A, annexed to the Petition.

The nature of the Petitioner's claim was stated by Mr. Justice Butler in the *Phelps* case as follows (274 U. S., 343-4):

> "Under the Fifth Amendment plaintiffs were entitled to just compensation; and, within the meaning of Sec. 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where

> pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. * * * (p. 344) The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use *at the time of the taking paid contemporaneously with the taking.* As such payment has not been made, petitioner is entitled to the additional amount claimed."

Consequently it was held that the owner was entitled to interest on the value of the property from the time of taking until payment was made.

Such an action must be brought "within six years after the claim *first* accrues."

> Judicial Code, Sec. 156; R. S., Sec. 1069, 28 U. S. C. A., Sec. 262.

The Court of Claims held that no cause of action had yet accrued, saying (R. 68):

> "There has as yet been no taking of plaintiff's land or any interest therein. * * * No portion of such lands has as yet been flooded. * * * The project may be abandoned or, for any one of a number of reasons, may not be completed in accordance with the original plan. The essential elements of a taking are lacking."

The *Mississippi River Flood Control* cases (*United States* v. *Sponenbarger*, 308 U. S. 256; *Danforth* v. *United States*, 308 U. S. 271) on which the Court of Claims relied, are entirely unlike the present case. In those cases the Government was committed to no definite plan. The Chief of Army Engineers had devised a general plan for the 900 miles from Cape Girardeau to the Gulf, which expressly provided that it was subject to change by the Chief of Engineers, as the

situation developed. In the *Sponenbarger* case, brought by the land owner under the Tucker Act, it appeared that the proposed floodway had been abandoned (308 U. S. at p. 268). Also the Court held that the program of the Act had "greatly reduced the flood menace to respondent's land by improving her protection from floods" (308 U. S. 267). Judgment for the Government was affirmed.

The *Danforth* case was a condemnation proceeding under the Mississippi River Flood Control Act of May 15, 1928 (Ch. 569, 45 Stat. 534), in which this Court held that the value of the property was fixed by a previous agreement between the land owner and the Government. That agreement fixed the value at about double the value as found by the Commissioners in the condemnation proceeding.

Nevertheless, the property owner contended in this Court that she was entitled to interest on the increased award from the date of enactment of the Mississippi River Flood Control Act (May 15, 1928) or from the date when the work of construction on the new levee was begun (October 21, 1929) or from the date when it was practically completed (October 31, 1932). These claims were rejected by this Court, which held (308 U. S. 284):

> "* * * we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award * * * (p. 286). The riverbank levee at the fuse-plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking."

The situation in that case is, of course, entirely different from that in the present case, where lands are intended to

be permanently flooded by a dam. Such an intention undoubtedly contemplates a taking.

1 Lewis on Eminent Domain (3d Ed.) Sec. 80;
*United States* v. *Lynah,* 188 U. S. 445, 469;
*Goodman* v. *United States,* 28 Fed. Supp. 497, 503.

Lewis says:

> "Where works are constructed below the lands of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made".

In *Shoemaker* v. *United States* (147 U. S. 282), relied upon in the Danforth case (308 U. S. 286), the Act there in question provided (147 U. S. 285):

> "* * * if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States".

The plaintiff refused to accept the award and it was paid into court (147 U. S. 321). It was held (p. 304) that the Court's charge to the Commissioners that they could not "consider the value given them (the lands taken) by the establishing the park" was correct. That ruling is in accord with our contention that the value of the petitioner's property must be determined without consideration of the effect on such value of the adoption by Congress, on August 26, 1937, of the Plan for the Central Valley Project.

This Court also held in the Shoemaker case that the value of the lands taken must be fixed as of the date of the vesting of title, which, by the Act there in question, as above stated, was fixed as the date of payment of the award into Court.

There is no such provision in the Statutes relating to the Central Valley Project.

The situation in case of a dam is entirely different from that in the Mississippi River Flood Control cases. The construction of a dam inevitably results in flooding lands above it. That is its purpose. The River and Harbor Act of March 3, 1899 (Ch. 425, Sec. 9, 30 Stat. 1151, 33 U. S. C. A., Sec. 401) provides that when the plans for a dam have been approved by the Chief Engineer and by the Secretary of War

> "* * * it shall not be lawful to deviate from such plans either before or after completion of the structure, unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

There is no suggestion that the plan for the Central Valley Project has been changed or abandoned or that Petitioner's lands will not be flooded; and, with the work three-quarters completed, the Court can hardly presume that there is any likelihood of abandonment.

Since the decision of the Court of Claims in this case, a similar question has been considered by this Court.

> *United States* v. *Miller*, 63 S. Ct. Rep., 276; decided January 4, 1943.

That was a condemnation proceeding arising out of the same Central Valley Project which is involved in the present case. Property was there taken for the relocation of the line of the Central Pacific Railroad. The Act of Con-

gress of August 26, 1937 (Ch. 832, Sec. 2, 50 Stat., 844, 850) authorized the Central Valley Project "in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress".

In that case the title was vested, pursuant to Act of Congress, as of December 14, 1938. It appeared, however, that the value of the property taken had increased, due to the adoption of the plan, between August 26, 1937, when Congress authorized the plan, and the date when title was vested. The Government contended that the claimant was not entitled to recover from the Government this increment of value, on the ground that "the United States was definitely committed to the project August 26, 1937".

The trial court ruled in accordance with the Government's contention; but the judgment was reversed by the Circuit Court of Appeals, on the ground that this ruling was incorrect.

In this Court the judgment of the Circuit Court of Appeals was reversed and the judgment of the District Court affirmed.

This Court held (63 S. Ct. 280):

> "Respondents correctly say that value is to be ascertained as of the date of the taking."

Also it was held that, as the lands in question were probably within the scope of the project from the time the Government was committed to it on August 26, 1937, any increase in value due to the Government project between that date and the vesting of title on December 14, 1938, could not be recovered.

In other words, the just compensation guaranteed by the Constitution could not be increased by any increment of value which was due to the adoption of the Government's plan, accruing after the Government was definitely committed to the project.

If a property owner is not entitled to any increment of value due to the Government project accruing after the Government is finally committed to the plan, it must equally follow that the owner of property taken is entitled to recover the value of his property as it was before the Government became committed to the project, without deduction for any subsequent decrease in the value of his property due to the Government's commitment to the plan in question.

Orgel on Valuation under Eminent Domain, Secs. 103, 104, p. 351;

1 Nichols on Eminent Domain (2d Ed.), Sec. 221, p. 676.

Orgel says:

> "It would be grossly unfair to permit a condemnor to take advantage of a depreciation in values caused by anticipated injuries from the proposed improvement and general recognition of this fact is perhaps reflected in the lack of definitive holdings on this point."

Nichols says:

> "To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done."

In the present case the petition alleges that the Petitioner's property had a substantial value for reservoirs for water supply purposes and for the development of a hydro-electric project (R. 6-8).

The value of the Petitioner's property for these purposes was destroyed by the adoption of the Government's plan on August 26, 1937, as, under that plan, all of Peti-

tioner's land which was below the 1065 foot elevation would be flooded.

After the passage of the Act of August 26, 1937, the Petitioner could not proceed to develop its hydro-electric project. Its dam sites were unavailable. Its reservoir for irrigation and power purposes was appropriated by the Government. Its property must lie idle from that date.

Even now, after work on the Shasta dam has proceeded for over five years, the work is only three-quarters completed. The Petitioner could not recover the value of any such improvements installed there during the period of many years which must elapse before the huge Shasta dam can be completed and the further years before the Shasta reservoir is filled with water and Petitioner's lands are actually flooded.

Lewis says (2 Lewis on Eminent Domain (3d Ed.), Sec. 742, p. 1321):

> "As we have before observed, the estimating and payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation."

In other words, Petitioner was deprived, after August 26, 1937, of all profitable use of its property for the purposes for which it was acquired and was adapted.

Consequently, so far as the Central Valley Project had any effect on the value of the Petitioner's property, the property must be valued as of August 26, 1937, when the Government became finally committed to the project.

It further inevitably follows that the property was then taken and that a cause of action then arose in favor of the Petitioner and against the Government.

*Matter of widening Wall-street,* 17 Barb. 617, 625.

In that case Roosevelt, J., said:

> "To deny to an owner the free enjoyment of his property in the only mode in which it could be enjoyed, as in this case by building on it, and to do so from considerations of possible or probable public advantage, expected to be realized, and that too for a period of indefinite duration, is to that extent as much and as truly a taking of private property for the public use, as if the entire fee simple were assumed."

This Court has constantly become more liberal to property owners in actions brought to recover just compensation under the Fifth Amendment. In the early cases only the value of the property was allowed, although it was not paid until years after the property was taken.

*United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645;
*United States* v. *North American Co.,* 253 U. S. 330.

Now, as already stated (*ante,* pp. 6-7), allowance is made for the owner's loss due to his inability to make profitable use of his property. It follows inevitably that, when the owner is deprived of the profitable use of his property, there is a taking of his property, and a right of action to recover therefor under the Fifth Amendment forthwith arises.

Condemnation cases, such as *Shoemaker* v. *United States* (147 U. S. 282), where the statute authorizing the condemnation proceeding fixes the date of the vesting of title, have no bearing on the question whether this petition shows the existence of a right of action under the Fifth Amendment as of August 26, 1937, when the Government became definitely committed to the project.

There must be some point of time when it can be said that the Petitioner's dam sites were definitely taken and this must be a point of time which is identifiable. Obviously the identifiable event is not when preliminary discussions first arose over the creation of the Central Valley Project and it is equally obvious that it is not the indefinite point of time in the future when the water rises behind the Shasta dam to the full elevation level of 1065 feet in the U. S. Geological Survey. The basis of the Petitioner's claim is for the destruction of its water power rights through the inevitable flooding of its land and therefore decrease in the head of water available at its dam sites. Between the passage of the Act of Congress authorizing the plan for the Central Valley Project and empowering the Secretary of the Interior to proceed with its development until the last foot of the 1065-foot level is reached, there is no event with which a taking of the Petitioner's dam sites can be identified. Certainly it cannot be said that a separate cause of action arises with each increase of a fraction of an inch in the level of water behind the Shasta Dam and that the Statute of Limitations as to that particular fraction of an inch begins to run as the water rises to that point. It takes years to fill a reservoir of the great capacity of that contemplated in the Sacramento River and during the period of filling the water level may in some years recede. On such temporary recessions should the Petitioner return compensation received and as the level rises again sue for a "taking"? Certainly also Petitioners have lost their property before the last inch of the 1065 foot level is reached.

Under the doctrine of *U. S.* v. *Miller*, supra, if the Petitioner, after Congress authorized the Central Valley Project, erected any dam structures on its property to utilize its water power facilities pending a complete flooding to the 1065-foot level, no recovery could be had against the

United States for the value of these facilities. The use of its property for the purpose for which it was acquired ended then on the date of the Act of Congress. The Petitioner has therefore had taken from it through the Act of Congress approving the Central Valley Project its dam sites and it is this Act of Congress that is the single identifiable event which fixes the taking of Petitioner's property by the United States.

This question is a very important one. If this application is denied and this Court should later hold that a right of action arose when the Act of August 26, 1937, was passed, the claim of this property owner would be barred after August 26, 1943. The question is important not only for this claimant but for many others similarly situated. The Court will take judicial notice that the Government has recently taken much property for war purposes, and similar questions may arise in many of these instances.

The question should be finally settled by this Court promptly, that owners whose property is taken by the Government may know their rights. Can they improve and enjoy their property or must they wait for years without any profitable use of their property until the project is completed and the property is flooded, and then be faced with the possibility of a decision by this Court that their cause of action arose when the Government became definitely committed to the project and that the claim is barred by the Statute of Limitations?

The plaintiff's petition for a writ of certiorari should be granted.

Washington, March 4, 1943.

SANFORD H. E. FREUND,
*Attorney for Petitioner,*
*55 Wall Street,*
*New York City.*

CARL A. MEAD,
*Of Counsel.*